



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 27, 1997

Mr. Scott Fawcett
Legal Counsel, Open Records Division
Comptroller of Public Accounts
111 East 17th Street
LBJ State Office Building
Austin, Texas 78774

OR97-0169

Dear Mr. Fawcett:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 103140.

The Comptroller of Public Accounts received a request for information concerning "all information in the comptroller's custody or in an attorney's custody relating to comptroller Hearing No. 32193 and the corresponding case, *American General Realty Investment Corporation v. John Sharp*, No. 95-03745, including the final audit showing all deletions." However, the comptroller seeks to withhold portions of the requested information based on sections 552.101 and 552.107 of the Government Code. You enclose marked representative samples of the information you seek to withhold, which include:¹

2. Audit Questionnaire
3. Audit plans
4. Notice of Tax Due
5. Audit Control Form
6. Penalty and Interest Waiver Worksheet
7. Audit Adjustment Reports

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

8. Audit Results by Tax Rate
9. Summary of Audit Results
10. Schedule Summaries
11. Audit Schedules
12. Audit Review Form
13. Supplemental Audit Exhibits
14. Amended Audit Report
15. Automated Audit Report
16. Index to Working Papers
17. American General's Contract
18. Administrative Hearing Documents
19. Correspondence Between the Comptroller's Office
And American General
20. Computer Screen Printouts
21. Miscellaneous Memoranda
22. Correspondence Between the Attorney General and American
General
23. Administrative Law Judges' Notes
24. Payment Voucher Documents
25. Documents constituting information exchanged in context of
Attorney-client relationship.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 111.006(a)(2) provides that information "secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer" is confidential. Tax Code § 111.006(a)(2).

The audit questionnaire is used to gather information from the taxpayer which allows the comptroller gain familiarity with the specific business operations before the audit start date. Consequently, the Audit Questionnaire and corresponding markings within exhibit 2 fall within the scope of information obtained by the comptroller during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act and must be withheld.

Exhibit 3 reveals a record of Audit Planning Activities and Audit Results as well as an Amended Record of Audit Planning Activities and Audit Results in which we observe markings redacting the taxpayer's principal representative(s) and title(s) as well as information revealing the estimated tax liability or credit and initial audit plans. We agree with the comptroller's markings as the information is within the scope of information obtained by the comptroller during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act.

Exhibit 4 reveals a Notice of Tax due with markings to withhold amounts due and payable upon receipt by the taxpayer. The court in *A&T Consultants, Inc. V. John Sharp*, 904 S.W.2d 668, 680 (Tex. 1995) concludes a proper balance is reached between section 552.022(1),(3) of the Open Records Act and the Tax Code with disclosure of the fact that an audit resulted in a deficiency assessment or refund warrant, but not to the extent that it would disclose the amounts of an assessment or refund. Consequently, we agree with the markings as set forth in Exhibit 4.

Exhibits 5, 6, 7, 8, and 9 contain documents with markings dealing with the primary error, tax, penalty and interest dollar figures, the sales tax deficiency or refund as worked out in the audit adjustment report as well as information showing the audit results by tax rate. We also note the inclusion of a summary of audit results. The information marked, with one exception, appears to be within the scope of information obtained by the comptroller during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act. We agree you may withhold the remaining marked information as set forth in those exhibits.

The information highlighted in the schedule summary under Exhibit 10 reveals information within the scope of information derived during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act. Accordingly the information which reveals those amounts subject to tax must be withheld under section 552.101.

The amounts shown in the audit schedules in Exhibit 11 were derived from the taxpayer during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act and so must be withheld.

Exhibits 12, 13, 14, 15, 16, 17 include: an Audit Review Form with markings which appear to consist of notes regarding the index and audit package, as well as documents which contain a marking concerning the original amount, an amended audit report, a document which evidences that it was derived from the audit, a copy of an automated audit report, and an index to working papers. These records are within the scope of information obtained by the comptroller during the course of an examination of taxpayer's officer or employees within the meaning of section 111.006(a)(2) of the Tax Code as applied through 552.101 of the Open Records Act.

Exhibit 17 is a document which the taxpayer provided to the comptroller during the course of the examination and so it is made confidential by section 111.006(a)(2) of the Tax Code and should be withheld from disclosure.

Under Exhibit 18, we observe that the documents are within the scope of information obtained by the comptroller during the course of an examination of taxpayer's officer or employees and as such are subject to section 111.006(a)(2) of the Tax Code and should be withheld.

Exhibits 19, 20 and 21 contain respectively, correspondence, various computer screen printouts and interagency memoranda derived as a result of the examination of the business as well as correspondence from the comptroller to the taxpayer addressing issues resulting from the examination. We have examined your markings and conclude that the most of the marked information comes within the scope of "derived from" and as such falls within the scope of section 111.006(a)(2) of the Tax Code and should be withheld.

Exhibits 22 and 23 contain communications from the Attorney General's office to the comptroller, as well as a proposed Agreed Judgment in *American General Realty Investment Corporation v. John Sharp*, No. 95-03745 (261st Dist. Ct., Travis County, Texas, 1995), correspondence addressing the issues derived as a result of the business examination, as well as notes from the administrative law judge involved in the administrative hearing. We have examined your markings and conclude that the marked information is made confidential by section 111.006(a)(2) of the Tax Code and should be withheld from disclosure.

Exhibit 24 consists of protest payment documents with markings to withhold the amount of tax deficiency refunded. The amounts at issue were derived from taxpayer furnished information. We have examined your markings and agree that the marked information is made confidential through section 111.006(a)(2) of the Tax Code and should be withheld.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. We have examined your markings on the documents submitted under Exhibit 25 and agree that most reflect both the attorney's legal advice and opinions. We have marked the portions of the documents which do not appear to come within the scope of section 552.107. You may withhold the remaining portions of documents from disclosure under section 552.107(1) of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Janet I. Monteros", written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 103140

Enclosures: Marked documents

cc: Ms. Ann del Llano
Attorney at Law
1200 D Castle Hill
Austin, Texas 78703
(w/o enclosures)